Supreme Court, U.S.
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No. 80-210

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NELLIE ATKINS ARMSTRONG,

Petitioner,

v.

MAPLE LEAF APARTMENTS, LTD., a limited partnership;
BROKEN ARROW MALL, INC., a corporation;
OWEN D. YOUNG AND ROBERT L. LATCH, d/b/a
YOUNG AND LATCH INVESTMENTS, a corporation;
FIRSTUL MORTGAGE COMPANY, a corporation;
SACKMAN-GILLILAND CORPORATION, a corporation;
FIRST NATIONAL BANK AND TRUST COMPANY OF TULSA, a
national bank association;
HAMILTON INVESTMENT TRUST, a Massachusetts business trust;
ABERCROMBIE, PEDIGO AND SMITH, INC.;
AND H. HAROLD BECKO,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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I. Introduction

The petition for certiorari is incredible in its assertions as to the importance of this esoteric case and flatly wrong in its presentation of the law. The opinion of the Court of Appeals below turns on an improbable and very detailed set of facts, as well as a statute (the Act of August 4, 1947, 61 Stat. 732) of rapidly dwindling application.

Indeed, the pertinent statute is of such limited significance as not to be codified in the United States Code and, as the Court of Appeals noted, is "not generally known among attorneys in Oklahoma, according to the finding by the trial court."[1] Moreover, the petition's cryptic Statement of the Case carefully elides the considerations that confine the precedential value of this case to an exceedingly narrow spectrum. As the opinion below makes clear, petitioner is an educated Indian[2] who was represented by experienced counsel and a certified public accountant[3] in extended negotiations[4] that resulted in a sophisticated sales contract which earned for petitioner substantial tax savings and "more than the then reasonable value of the land."[5] Petitioner then knowingly concealed from the purchaser her obligation to obtain court approval under the Act of August 4, 1947, and diligently and deliberately refrained from taking any action to assert her claimed rights until extremely valuable apartments and shopping centers had been completed.[6] As a reward for her cunning and concealment, petitioner now asks that she be allowed to cancel the sale (which took place almost a decade and a half ago), acquire title to more than $1,700,000.00 in improvements on the property, and keep the original purchase price.

In the entire history of the Indian land allotment system, there has never been a case even remotely

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[1] Appendix to the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit [hereafter referred to as "App."] at A.6.

[2] App. at A.6.

[3] App. at A.7 and A.56.

[4] App. at A.8.

[5] App. at A.10.

[6] *Id.*

similar to this one.[7] With the steady assimilation of Indians into contemporary society and the continual reduction of restricted lands, there is scant reason to think there will ever be another.

II. Two-Thirds Of The Land In Question Was Unrestricted At The Time Of The Conveyance.

The fourth of the Questions Presented for Review[8] can be treated easily and briefly. It is altogether apparent that, pursuant to statute, two-thirds of the land at issue was not subject to any restrictions at all at the time of the contested conveyance.

Petitioner and her two brothers acquired 120 acres of land by inheritance from their father, a full blood Creek Indian who died in 1929.[9] The children were of the half blood.[10] Petitioner does not deny that, in 1944, when she and her brothers exchanged deeds (giving each a full interest in respective 40 acre tracts) there were no applicable restrictions on transfer of the land (either imposed on the land or upon petitioner and her brothers) and the land was freely alienable.[11]

The Act of August 4, 1947, was, as its name indicates, passed subsequently. It had the effect, in rare

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[7] The sui generis character of this case renders meaningless petitioner's bold claims that the decision of the Court of Appeals conflicts with decisions of other courts. No other court has ever considered a comparable hybrid of factual and legal questions.

[8] Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit [hereafter referred to as "Petn."] at i.

[9] App. at A.4-A.5.

[10] App. at A.5.

[11] App. at A.5. This case involves only 19 acres, approximately, of the land acquired from petitioner's father.

instances, of imposing transfer restrictions upon certain inherited lands theretofore free of restrictions. The material portion of the Act imposed restrictions upon transfer of:

> . . .[A]ny *interest* in land acquired before or after the date of this Act by an Indian heir or devisee of one-half or more of Indian blood, when such interest in land was restricted *in the hands* of the person from whom such Indian heir or devisee acquired same. . .

(Emphasis added.) Petitioner acquired a two-thirds interest in the lands involved in this action by the deeds from her brothers in whose hands *such interests* were not restricted. The manifest effect of the Act is to re-impose restrictions only on interests which were restricted *at the time* such interests were acquired; the interests petitioner acquired from her brothers were not restricted "in their hands".

Petitioner attempts to avoid the result mandated by the plain language of the 1947 Act by claiming that she acquired no "interest" in land from her brothers, but—by virtue of a "voluntary partition"—merely effected a rearrangement of the interests she shared with them. The authorities cited for this proposition have their source in doctrines of "ancestral estates" in local (Oklahoma) laws of inheritance.[12] As such, they

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[12] Petitioner's argument fully exposes the nature of the state law property issue that she asks this Court to review. Referring to the opinion below, petitioner states: "Thus an important state question has been decided in a way which conflicts with applicable state law. . . ." Petn. at 25. There is in fact no conflict. The Court of Appeals' opinion relied in part on *Boyd* v. *Weer*, 253 P. 988 (Okla. 1927), to support its conclusion that the petitioner's interest acquired from her brothers in 1944 was an estate of purchase and not one of inheritance. App. at A.11. *Boyd* and other cases leading to the same conclusion were fully briefed for the respondents in the Court of Appeals.

assuredly present no federal question, but, rather, involve only abstruse nuances of local law not appropriate for consideration by this Court.[13]

III. Application Of The Doctrine Of Laches Is Amply Justified.

The remaining Questions Presented for Review, expressed as three separate issues,[14] actually involve only one question. That is, whether the Court of Appeals erred in applying the equitable doctrine of laches to preclude petitioner from recovering the one-third interest she inherited from her (restricted) full blood father. There is, to be sure, no doubt whatsoever that the bizarre facts on which the lower courts relied would, in any other context, offer the quintessential justification for the application of laches.[15] In truth, the District

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[13] R. Stern & E. Gressman, *Supreme Court Practice* (5th ed. 1978) §410 at 283. Petitioner also seeks to create a sufficiently important federal question by arguing that the Court of Appeals' partition ruling will itself destroy previously honored exemptions from certain Oklahoma taxes. Petn. at 27-28. The effort proves too much, for it ignores that that ruling pertains only to partitions accomplished before the Act of August 4, 1947 — partitions accomplished when the interests acquired were not restricted in the grantors' hands. Thus the ruling does not "destroy[] restrictions," *see* Petn. at 27, but merely recognizes that the 1947 Act does not *by its terms* operate to create the rights petitioner has asserted throughout this case.

[14] Petn. at i.

[15] Petitioner argues that the Court of Appeals erred in its dictum that laches can only apply defensively (thus ostensibly creating an incentive for Indians to regain their lands forcibly rather than relying on peaceable means). Petn. at 22-23. This is true, however, of the doctrine of laches generally. The Court of Appeals' opinion simply reflected well-established rules of equity in its comments on the effect of an invocation of the doctrine of laches.

Furthermore, even if the dictum in question were incorrect, it is hardly the role of certiorari to modify improvident dicta of the lower courts.

Court and the Court of Appeals were charitable in skirting use of the term "fraud" and invoking laches instead.

Nonetheless, it is petitioner's contention that the application of laches in this case is of such momentous importance that it warrants this Court's granting certiorari, reversing the decision below, and bestowing upon a scheming, well-advised seller—at the expense of wholly bona fide subsequent transferees—a windfall of more than one and three-quarters million dollars.[16] In support of this astonishing proposition, petitioner proffers selected cases arising under the General Allotment Act (25 U.S.C. § 33) which has never been applicable at all to any member of the Five Civilized Tribes, and various cases predating the Act of April 12, 1926 (44 Stat. 239) on which the Court of Appeals relied as permitting the defense of laches.

The basis of the cases allegedly prohibiting estoppel by laches to rebuff attempts by members of the Creek Nation of Indians to recover lands "sold" by them is primarily Section 17 of the Supplemental Creek Treaty of August 8, 1902 (32 Stat. 500). That Section included the following language: "Any agreement or lease of any kind or character violative of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity."

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[16] Petitioner suggests that the "incompetence and thriftlessness" (Petn. at 16, quoting *Heckman* v. *United States*, 224 U.S. 413, 32 S.Ct. 424, 56 L.Ed. 821 (1912)) of Indians excuses petitioner from refunding the purchase price of more than $100,000.00 that she received for the sale of her property. The notion that Indians are incompetent or thriftless can rightly be understood as a crude and unfair slur. As applied to this petitioner — a well-educated and well-advised Creek of the half blood — it is absolutely ludicrous.

The restrictions imposed by the original Creek Treaty and the Supplemental Creek Treaty have, however, long since expired. Congress has extended the restrictions in subsequent legislation, but not entirely as originally stated. The subsequent legislation has, in fact, released some restrictions and, in isolated instances such as with the Act of August 4, 1947, re-imposed some restrictions previously removed.

In any event, petitioner's claims are in no manner based upon the original Creek Treaty or the Supplemental Treaty. All restrictions on the entire 120 acres that she and her brothers inherited from her father upon his death in 1929 were released at the time of his death[17] by Section 9 of the Act of May 27, 1908 (35 Stat. 312). The only restrictions upon transfer involved in this case are those created by the Act of August 4, 1947, and it alone; this case in no way involves any treaty between the United States and any Indian, or Tribe or Nation of Indians. Nothing in the Act of August 4, 1947, or the meager legislative history surrounding its passage indicates any legislative intent to incorporate any of the language of any of the many treaties with any of the Five Civilized Tribes. The decision below is of very circumscribed applicability in that it involves one of the instances in which restrictions were re-imposed upon lands long free of such restrictions. The Court of Appeals was thus able, in this aberrant case, to focus its analysis on the issues free of the litany spawned by the non-estoppel language of the Supplemental Treaty and its progeny.

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[17] App. at A.5.

IV. No Considerations In This Case Indicate That Certiorari Should Be Granted.

The frenzy expressed in Part VI of the Petition betrays the extent to which petitioner's anxiety has overcome reason. Petitioner contends that, in affirming the decision of the District Court which held the Act of August 4, 1947, to be unconstitutional as applied, the Court of Appeals has rendered a decision "creating havoc and instability in Oklahoma Land Titles."[18] Not a word in the opinion of the Court of Appeals suggests it was in any manner vouching for the District Court's rationale. On the contrary, that opinion states explicitly that, "The judgement of the trial court is affirmed, again *for the reasons herein set forth. . . .*"[19] The Court of Appeals quite carefully avoided basing its opinion on any constitutional ground. Its mandate is clearly a function of Oklahoma law. *Cf.* Petn. at 25 ("The Court of Appeals totally ignored Oklahoma law *which is controlling and determinative.*" (Emphasis added.)).

It is noteworthy that in the thirty-three years since passage of the Act of August 4, 1947, there has been no other reported decision with facts even vaguely akin to those of the instant case. There is, moreover, a paucity of reported opinions involving any aspect of the legislation. No doubt the lack of judicial attention to this Act can be attributed to the fact that the number of Indians holding lands restricted by this Act diminishes as restrictions are removed—a process accelerating as more lands pass by inheritance to newer generations with greater education and experience.

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[18] Petn. at 28.

[19] App. at A.17 (emphasis added).

The Court of Appeals for the Tenth Circuit has for many years decided almost all federal appellate cases involving the specialized land laws applicable to properties of Indians of the Five Civilized Tribes. This is inevitable since most such Indians live in, and all of their lands are located in, the State of Oklahoma. The court has developed an expertise in this arcane area which should be respected and followed unless egregiously misapplied. If, as petitioner now urges, the decision of the Court of Appeals marks a departure from prior law, to be followed again, it is suggested that some ventilation of the doctrine in the lower courts would be helpful and useful to this Court before it turns its attention to the emerging doctrine.

If, on the other hand, as respondents believe, the opinion represents a principled yet pragmatic response to a truly novel situation and no further developments occur, any review by this Court of the decision below would serve as a precedent only for this case. Furthermore, considering the egregious conduct of Petitioner and the attendant enormous losses to all of the respondents, this case is a poor one in which to explore isolated issues concerning a steadily shrinking class of landowners.

V. Conclusion

The petition has grossly distorted the opinion of the Court of Appeals and exaggerated its effect. The entire petition is an attempt to inflate, for petitioner's benefit, the importance of an unexceptional holding based upon essentially unique facts, an uncodified statute, and a parochial field of law.

It is significant that no reported decisions have been found applying the 1947 Act to the only real question

(laches) presented by the petition in this case. The number of Indians holding lands restricted by this statute (as distinguished from other statutes and treaties) and the amount of lands involved have diminished greatly and will continue to do so as the process of assimilation proceeds, especially as to members of the Five Civilized Tribes. The case is clouded by issues of purely local property law and even if, as petitioner urges and respondents deny, the decision of the Court of Appeals represents a departure from prior law or the beginning of a new doctrine, review by this Court can well await further development in other decisions.

Respondents are mindful of the factors which are relevant to consideration of petitions seeking to invoke this Court's discretionary certiorari power. Accordingly, respondents have avoided any extended treatment of the merits of the legal issues presented to the Court of Appeals as it appears the instant case does not involve federal questions of sufficient general importance to merit the Court's review.

For all of the foregoing reasons, certiorari should be denied.

Respectfully submitted,

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